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No. 33.

Brief of Knauth, Briesen & Johnson for Petitioner on mo

Supreme Court of the United States.

Filed Jan. 2, 1901.

OCTOBER TERM, 1900.

No. 33.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN.

Brief for Petitioner on Motion to Recall Mandate and Amend Decree.

ANTONIO KNAUTH,
ARTHUR v. BRIESEN,
JOHN G. JOHNSON,
Of Counsel for Petitioner.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

EMILIE SAXLEHNER, Petitioner,	October Term, 1900.
vs.	No. 33.
ALEXANDER NIELSEN.	

BRIEF ON BEHALF OF PETITIONER ON MOTION TO MAKE DECREE MORE DEFINITE AND CERTAIN.

A similar motion is made in this case by the petitioner as is made by her in the case against Eisner & Mendelson Company, No. 29, to make the decree of this Court entered on October 15, 1900, more definite and certain so as to enable the petitioner to enter a decree in the Court below enjoining the defendant from the use of any imitation of her bottle, label and capsule used for her Hunyadi Janos water, in accordance with the prayer of her bill of complaint.

As is stated in the opening part of the opinion of this Court the bill of complaint in this case sought to enjoin the defendant from selling a water under the name of "Hunyadi Lajos" or any other name in which the word "Hunyadi" occurred, as well as selling such water in bottles or under capsules or labels resembling those of the plaintiff upon her bottles of Hunyadi Janos water. The charge of in-

fringement and the prayer for relief were substantially like those in the case against the Eisner & Mendelson Company (Record, pp. 4 and 6 respectively), the defendant's answer denied such infringement upon plaintiff's bottle, label and capsule and claimed for the bottle and capsule the same defenses as were claimed on behalf of the label (Record, p. 102), which defense was in substance that while the similarity was admitted, it was claimed that the general style of bottle, capsule and label had lost their individuality and other indication of ownership by long undisturbed use.

The evidence did not leave any doubt upon the question of plaintiff's adoption of the peculiar style of bottle, the same being of a straight shape with a short neck, to the top of which was attached a metal capsule bearing a circular inscription surrrunding the portrait (Record, p. 12), and the close similarity and practical identity of defendant's bottle and capsule (Record, p. 18). As in the other case, already mentioned, the evidence also showed that different other bitter waters were sold in bottles of different shapes and sizes on the American market (Record, p. 33).

The case was originally to have been argued at final hearing in the Eastern District of New York, but was assigned to be heard by the same Judge in the Southern District before whom the principal case against the Eisner and Mendelson Company was argued at final hearing, and it was argued, submitted and decided at the same time and in substantially the same manner. The Judge of the Circuit Court who decided the case against the Eisner & Mendelson Company came to the conclusion that, while plaintiff's style of bottle, capsule and label had been clearly imitated, the defendant in that case escaped the charge of infringement by adding to the label on the bottles its own seal brand label. Holding this view, he could not grant the complainant more than a decree upon the label only when used without the seal brand label. The consequence

was that he directed in the present case also the entry of a decree upon the label merely, although the very decree entered by him recognizes that the defendant has sold "bitter water in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being of a straight shape with a short neck, bearing labels, &c." (Record, p. 152).

The complainant's assignment of errors covered every particular of the relief which the complainant had demanded, and which had been denied to her by the Circuit Court (Record, pp. 155-156), but even if that had not been sufficiently assigned, this Court had undoubtedly the power to correct any error committed by the Court below in adjudicating the rights of the complainant and their violation.

U. S. *vs.* Tenn. & C. R. Co., 176 U. S., 242, 256.

This Court has found very explicitly in the principal case against the Eisner & Mendelson Company that Saxlehner had acquired a right to be protected in the shape of his bottles, the design of his capsules and his labels, against fraudulent imitation, and has also found that the defenses successfully made against complainant's claim under the name "Hunyadi" did not apply to the style of the bottles or labels. Inasmuch as the decree in this case, made by the Circuit Court, states that the defendant had sold his water in such bottles imitating those of the complainant, it is evident that the complainant should be entitled to the same relief as in the other case, and in our opinion this was intended as much by this Court as it was intended by the courts below, which in every instance decided the two cases in the same manner and upon substantially the same proofs.

We will not repeat here the argument nor cite the authorities given, cited by us upon our brief in the principal case to show that complainant is entitled to suppress the use of her style of bottles in the same manner as her style of labels, and that if

either of them is withheld from her, manifest injustice will result in this case.

In cases of unfair competition it is not possible to define the relief more than by general statements, and the relief depends very much upon the question of how far the defendant is allowed to use any of the insignia of plaintiff's trade. Here the defendant, by the final decree of this Court, is enabled to use with impunity the name "Hunyadi Lajos," although it is not only similar in sound to plaintiff's trade name "Hunyadi Janos," but even contains the complainant's original trademark "Hunyadi." By a force of circumstances, of which she was the unfortunate victim, she has lost the trade name "Hunyadi" and the defendant is able to sell a similar water under the name which for many years denoted only complainant's product. In that situation a duty arises very clearly on the part of the defendant so to dress his goods as to avoid every possible confusion with complainant's Hunyadi water, and an injunction upon the shape of the bottle and capsule is therefore called for much more emphatically than if defendant had been enjoined from the use of the name "Hunyadi." If such an injunction should be withheld from her in this case, the consequence would be that the innocent retailer of this water, the Siegel-Cooper Company, would be more restricted than the fraudulent originator of the imitation, the defendant in this case, because under the direction of this Court the complainant is clearly entitled to enter in the suit against the Siegel-Cooper Company a decree of injunction against the use of the bottle, capsule and label, as prayed in her bill of complaint.

It seems to us very clear that this Court did not intend by the concluding sentence of its opinion to restrict the Circuit Court to the entry of a decree, confined to the label only, such as that of July 18, 1898, but in view of the doubt entertained by the Judge of the said Circuit Court, and certified to by

him in the case against the Eisner & Mendelson Company, we respectfully ask that the directions of the decree of this Court of October 15, 1900, be made so definite and certain as to enable the petitioner to enter a decree upon the shape of the bottle, design of capsule and label in the Court below in accordance with the prayer of her bill of complaint in this case.

Respectfully submitted,

ANTONIO KNAUTH,
ARTHUR V. BRIESEN and
JOHN G. JOHNSON,
Of Counsel for Petitioner.